Supreme Court, U.S.
FILED
06-342 AUG 22 2006
OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

William Lenard Montgomery
Petitioner

v.

United States Postal Service
Respondent

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

William Lenard Montgomery
Petitioner, Pro Se
16811 Highway 171
Northport, AL 35475-1459
(205) 339-2292

QUESTIONS PRESENTED FOR REVIEW

1. In light of research by human behavioral specialists which shows a correlation between a person's personality and his/her age, when the employer states that it selected a younger job applicant over an older, equally or more qualified job applicant because the younger applicant had a better personality, if this reason for non-selection were, in truth, pretext; how does the Age Discrimination in Employment Act of 1967 ("ADEA") protected individual avail himself/herself of the full and fair opportunity to demonstrate pretext if age-related personality differences actually exist, and, does the determination of "better personality," have a disparate impact on the older job applicant?

2. Is it reasonable for the complainant in a Federal employment discrimination proceeding to expect that, by Supreme Court precedent in Texas Department of Community Affairs v. Burdine, 450 U.S. at 255-56, 101 S. Ct. 1094 (1981), and through Executive Order 12067, rules listed and published in Federal Agency employment and job interviewer handbooks, manuals, etc., and submitted during formal discovery, must have been; and must continue to be, adhered to by the said Federal Agency?

3. In an ADEA complaint involving multiple and distinct incidents spanning several years, of the employer's selection of a younger job applicant over an ADEA protected applicant; which reaches trial as an admitted prima facie case, should Walker v. Mortham, 158 F.3d 1177, (11th Cir. 1998) and the McDonnell Douglas burden shifting framework be applied, with each incident to be considered separately using information available to the selection official at the time of selection?

PARTIES TO THE PROCEEDINGS

1. Alice H. Martin, U.S. Attorney For the Northern District of Alabama, Counsel for Defendant and Respondent;

2. William Lenard Montgomery, Plaintiff and Petitioner, Pro Se;

3. John E. Potter, Postmaster General, United States Postal Service, Defendant and Respondent;

4. Jenny Lynn Smith, Assistant U.S. Attorney For the Northern District of Alabama, Counsel for Defendant and Respondent.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... -i-

LIST OF PARTIES..... -ii-

TABLE OF CONTENTS..... -iii-, -iv-

TABLE OF CITED AUTHORITIES..... -iv-

OPINIONS..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE..... 2,3

STATEMENT OF THE CASE..... 3,4

REASONS WHY CERTIORARI SHOULD BE GRANTED..... 5

I. Review is Warranted Because The Federal Employer, By Acting in a Manner Upheld by The United States Court of Appeals for the Eleventh Circuit, Can, At Will, Circumvent the Age Discrimination in Employment Act of 1967. 5-7

II. Review is Warranted Because, Without Intervention By This Court, Violations, at Will, of Federal Agency Rules As Seen in Federal Agency Employment Handbooks, Employment Manuals, and Job Interviewer Instructions; May, Currently; and in the Future, Adversely Affect a Large Number of Federal Job Applicants and Federal Employees..... 8-12

III. Review is Warranted In That Clarification By This Court Is Needed As To Whether the McDonnell Douglas Burden Shifting Framework Applies To ADEA Complaints, and, if So; How it Treats Multiple Incidents Of Non-Selection For Employment Within One ADEA Complaint 13-16

CONCLUSION.....17

TABLE OF AUTHORITIES

CASES

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973)..... -i-,13,15

Smith v. City of Jackson, Mississippi,
544 U.S. 228 (2005)..... 6

Texas Department of Community Affairs v. Burdine,
450 U.S. at 255-56, 101 S. Ct. 1094 (1981)..... -i-,6,7,9,11

Walker v. Mortham, 158 F.3d 1177, (11th Cir. 1998).... -i-,14

STATUTES

Age Discrimination in Employment Act
of 1967.....-i-,2,3,5,6,7

OPINIONS

The opinion of the United States Court of Appeals for the Eleventh Circuit filed on April 26, 2006, is reprinted in the Appendix hereto, Pgs 1-5.

The order of the Eleventh Circuit denying rehearing and rehearing *en banc* filed on June 13, 2006 is reprinted in the Appendix hereto, Pgs 6 and 7.

The order of the Eleventh Circuit striking documents 2 and B-F of the Appellant's Record Excerpts filed on January 12, 2006; is reprinted in the Appendix hereto, Pg 8.

The final order and memorandum from the United States District Court for the Northern District of Alabama was filed on April 28, 2005

The order and memorandum from the District Court denying summary judgment to both parties was filed on February 10, 2005.

The order by which the January 10, 2003 District Court ruling was vacated and remanded was issued by the Eleventh Circuit on September 24, 2003

The opinion and final order granting summary judgment to the Respondent was issued by the United States District Court on January 10, 2003.

JURISDICTION

On April 26, 2006 the United States Court of Appeals for the Eleventh Circuit issued an order affirming the April 28, 2005 ruling of the United States District Court for the Northern District of Alabama.

On June 13, 2006 the Eleventh Circuit issued an order denying Petitioner's petition for rehearing and rehearing *en banc*.

The jurisdiction of the United States Supreme Court to review the Judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Age Discrimination Act of 1967

29 U.S.C. § 623 (4)(a): It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age;

Executive Order 12067

1-304. All Federal departments and agencies shall advise and offer to consult with the Equal Employment Opportunity Commission during the development of any proposed rules, regulations, policies, procedures or orders concerning equal employment opportunity. Departments and agencies shall formally submit such proposed issuances to the Equal Employment Opportunity Commission and other interested Federal departments and agencies at least 15 working days prior to public announcement. The Equal Employment Opportunity Commission shall review such proposed rules, regulations, policies, procedures or orders to ensure consistency among the operations of the various Federal departments and agencies. Issuances related to internal management and administration are exempt from this clearance process. Case handling procedures unique to a single program also are exempt, although the Equal Employment Opportunity Commission may review such procedures in order to assure maximum consistency

within the Federal equal employment opportunity program.

STATEMENT OF THE CASE

Subsequent to administrative proceedings with the United States Postal Service (Respondent), in which the Respondent alleged that the Petitioner's complaint was untimely and subsequent to the denial of a *pro se* appeal to the Equal Employment Opportunity Commission, this *pro se* complaint was brought forth, by permission; under the Age Discrimination in Employment Act of 1967, as Amended. It was filed on August 22, 2002 under the jurisdiction of the United States District Court, Northern District of Alabama and pursuant to 28 U.S.C. §§1331 and 1343(a)(3) and (4). As required by the District Court, the Petitioner submitted copies of his appeal to the EEOC which included a series of the Petitioner's letters to the Respondent and the Respondent's responses over the period 1996-2000.

On January 10, 2003 the District Court issued an Order and a Memorandum of Opinion in which it based some of its findings on information seen in some of the letters referred to above. Doc 20-Pg 6. It granted summary judgment to the Respondent, stating that the Petitioner's complaint was untimely.

The Petitioner timely appealed to the United States Court of Appeals for the Eleventh Circuit on March 10, 2003. The Eleventh Circuit, in its September 24, 2003 Opinion referred to the letters to which reference was made above, vacated the District Court's Order and remanded the complaint for further proceedings.

Subsequent to remand, the Petitioner secured representation by attorneys who filed a notice of appearance. After a discovery period in which the Respondent submitted Hiring Worksheets showing that the Petitioner had been in the top group of three for employment consideration for

eleven different jobs on nine different Hiring Worksheets over the period 1995-1998, both parties filed for summary judgment on November 30, 2004. On February 2, 2005 the District Court issued a Memorandum of Opinion, stating, Doc 49- Pg 9: "...Defendant's production and assertion that others were hired instead of the plaintiff because they were the 'best fit' for the position, without more, is not sufficient to rebut Plaintiff's prima facie case," and Doc 49- Pg 10: "The defendant's intent in this case remains the 'ultimate question,' Id., and that question is best resolved at trial."

This case went to bench trial on April 18, 2005. The Respondent brought forth testimony that the job applicants who were chosen over the Petitioner had a better personality than the Petitioner. The Respondent, in the discovery process had submitted to the Petitioner a copy of Handbook EL-312 "Employment and Placement." The Hiring Worksheet for the November 1998 job for which Petitioner was called in for interview with the Respondent, listed the Petitioner as an eligible applicant for this position. At trial, among other things, Respondent witnesses testified that the Petitioner was not hired for this job because he was not eligible. The District Court ruled for the Respondent on April 28, 2005.

The Petitioner, acting *pro se*, timely filed an appeal before the Eleventh Circuit on May 31, 2005. On January 12, 2006 the Eleventh Circuit issued an Order by which the letters referred to above were stricken from the Record Excerpts. On April 26, 2006 the Eleventh Circuit issued an Opinion by which it affirmed the District Court ruling, referring to the Respondent's complaints regarding the Petitioner's personality and stating, "Under the circumstances, we agree with the district court that Montgomery was not unfairly surprised by the USPS' evidence at trial." The Eleventh Circuit, on June 13, 2006 denied the Petitioner's Motion for Rehearing and Motion For Rehearing *En Banc*.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

Review is Warranted Because The Federal Employer, By Acting in a Manner Upheld by The United States Court of Appeals for the Eleventh Circuit, Can, At Will, Circumvent the Age Discrimination in Employment Act of 1967.

Research conducted by Sanjay Srivastava and Oliver P. John, Institute of Personality and Social Research, University of California, Berkeley; Samuel P. Gosling, Department of Psychology, University of Texas at Austin; and Jeff Potter, Cambridge, Massachusetts; and published in the *Journal of Personality and Social Psychology*, Vol 84, No. 5, 1041-1053 (2003), dealing with a large sample (N=132,515) of adults aged 21-60, showed the existence of age-related differences in person's personalities.

In this case, the employer, Respondent, when faced with the choice between job applicants who had progressed to the final group of three after application, testing (the results of which the employer states is a predictor of the likelihood of the applicant being able to perform the job duties: Record, Doc 46, Joint Status Report, Pg 3, Item No. 5), and placement on a job register, stated that it hired the younger applicant over the older, equally or better qualified ADEA protected applicant, Petitioner, because the younger job applicant had a better personality. Doc 79-Pgs 35, 37, and 38. The assessment of "better personality" was made by a job interviewer based upon impression only, without data, and without the administration of any type of personality test.

Two major considerations arise regarding the personality issue. The first consideration concerns the circumstance in which personality, as given by the employer

as the reason for the selection of a younger job applicant over the ADEA protected job applicant; is used by the employer, intentionally, as pretext. This tactic can be utilized by the employer to its advantage and has the potential for abuse in that the employer may put forth this reason at will, while the ADEA protected job applicant has little or no recourse, especially, as in this case when personality is not specifically given as the reason for failure to hire until the trial begins. Doc 46-Pg 8 (Item No. 27) and Pg 9. According to Texas Department of Community Affairs v. Burdine, 450 U.S. at 255-56, 101 S. Ct. 1094 (1981) (hereinafter "Burdine"), the plaintiff must be given the full and fair opportunity to demonstrate pretext. It is extremely difficult, if not impossible, for the job applicant/Plaintiff to establish the meaning of the subjective term, "better personality," in general; and specifically, in regard to "head-to-head" comparisons of job applicants. The employer/Defendant has the advantage of laying the ground rules, of arbitrarily stating which applicant's personality is better, then, at trial; the job applicant/plaintiff is placed in the tremendous disadvantage of having to demonstrate to the Court that the defendant is not credible. If age-related differences in person's personalities exist, how can the Plaintiff rebut the Defendant's claim that the younger job applicant demonstrated the better personality?

Beyond the consideration of the answer to the question as to what constitutes a "better personality," if the employer's decision as to which applicant is "better," the younger individual or the older ADEA protected individual; is based on characteristics which are inherent to the older applicant's age, then this decision, intentional or not, cannot be seen as one which involves a reasonable factor other than age. This seems to meet, among other things, the "test" provision which was cited by this Court in Smith v. City of Jackson, Mississippi, 544 U.S. 228 (2005); as the Court affirmed that, under certain conditions, disparate impact

claims are available under the Age Discrimination Act of 1967:

> Here, Petitioners have done little more than point out that the pay plan is relatively less generous to older workers than to younger ones. They have not, as required by *Wards Cove*, identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers.

In the case now presented, upon raising the personality issue, the Respondent proceeded to compare job applicants based upon the impressions of a job interviewer, without allowing the applicants the benefit of a formal and objective comparison which could result from the administration of a standardized personality test. In effect, the Petitioner was subjected to a form of a "test," while being denied the objectivity which a standardized test could have provided. The Petitioner was denied the opportunity to argue disparate impact in the District Court proceedings in that the personality issue, in direct conflict with Burdine, was not brought forth by the Respondent until the trial was under way

Regarding the trial proceedings, and the Petitioner's opportunity to demonstrate pretext, if a standardized personality test had been administered, the Petitioner would not have been placed in the position of having to refute the credibility of the job interviewer's testimony. The Eleventh Circuit's Opinion in this matter seemed to hinge upon the trial Judge's perception of the credibility of the Respondent's witnesses.

The employer, intentionally or not, circumvents the ADEA when it brings forth the ADEA protected job applicant's personality as the reason for non-selection. For the stated reasons the Petitioner respectfully requests that the Court grant review of this issue. .

II.

Review is Warranted Because, Without Intervention By This Court, Violations, at Will, of Federal Agency Rules As Seen in Federal Agency Employment Handbooks, Employment Manuals, and Job Interviewer Instructions; May, Currently; and in the Future, Adversely Affect a Large Number of Federal Job Applicants and Federal Employees.

By and through Executive Order 12067, the Equal Employment Opportunity Commission has been empowered to delegate certain authority to Federal Agencies in the effort to combat employment discrimination, and, by Section 1-304; "ensure consistency among the operations of the various Federal departments and agencies," in the employment rules, regulations, policies, procedures, etc., which may emanate from the said departments and agencies. From this, it is reasonable to expect that employment rules, regulations, policies, procedures, etc., published in Federal Agency employment handbooks, employment manuals, and job interviewer instruction modules, should be adhered to at all times by the issuing Federal Agency.

The United States Court of Appeals for the Eleventh Circuit stated in its April 26, 2006 Opinion, "...we agree with the district court that Montgomery was not unfairly surprised by the USPS' evidence at trial." During the formal discovery period, attorneys for the Petitioner asked the Respondent to state the policies and procedures applicable to hiring from its CLERK/CARRIER registers for the years 1995 through 2000. The Respondent referred the Petitioner to Chapters 4, 5, and 6 of "Handbook EL-312, Employment and Placement." Doc 45, Plaintiff's Ex. No. 5; Plaintiff's Interrogatory No. 1, and Doc 45, Plaintiff's Ex. No. 6; Defendant's Response to Plaintiff's Interrogatory No. 1. Violations of rules and

procedures listed in the Respondent's employment handbooks and interviewer instruction module occurred in such a manner as to mislead the Petitioner during the discovery process in direct conflict wi .1 Burdine.

The Eleventh Circuit, in its April 26, 2006 Opinion stated: "During the EEOC mediation prior to his lawsuit, Montgomery learned that his confrontation with the postal worker was the reason for at least one of the hiring decisions." The Eleventh Circuit erred by not referring to this as an alleged confrontation. The Respondent's allegations regarding a confrontation are false. The series of the Petitioner's letters to Respondent and their responses, show that, among other critical points, this alleged confrontation could not have occurred on the date which the Respondent claimed, in that the allegation stemmed from the Petitioner's effort to certify and mail a March 14, 1996 letter of complaint to the Respondent. The selection official changed her trial statement that she was present during the alleged confrontation to state that she heard it. She claimed it occurred in July, 1998. The Petitioner was told during the referenced mediation that the Respondent made an "objection" for the July, 1998 position only. During discovery, material submitted to the Petitioner's attorneys by the Respondent showed that no selection was made for the July, 1998 job, therefore; no claim of employment discrimination could be lodged, making this particular job opening irrelevant to the complaint. Hiring Worksheets submitted by the Respondent during the discovery period revealed that the Petitioner's name appeared in the group of top three applicants for eleven different positions. The Petitioner's name was listed on the Hiring Worksheet for the November, 1998 job following the July, 1998 consideration. Doc 45, Plaintiff's Ex. No. 9, Hiring Worksheet No. 98-00702. According to "Handbook EL-312, Employment and Placement," an applicant who is disqualified is not to be included as available on the Hiring

Worksheet. Doc 45, Plaintiff's Ex. No. 7, Chapter 5, Pg 150. The Petitioner was called in to interview for this position. Doc 46-Pg 8. A 25 year old applicant with the same test score was selected over the Petitioner. Doc 46-Pg 8.

The Eleventh Circuit, in its April 26, 2006 Opinion, Footnote No. 2, stated: "Rigby [sic], a hiring official, also testified that this incident led her to request that Montgomery not be considered for future positions with the Post Office and to decline to interview him for future jobs." A selection official cannot disqualify a job applicant on the basis of derogatory information other than that in the job application without the applicant being given the opportunity to comment on the information. "This opportunity is provided by a letter of inquiry...." Doc 45, Plaintiff's Ex. No. 7. Chapter 5, Pg 122. The Petitioner never received such a letter. Doc 45, Plaintiff's Ex. No. 1; Plaintiff's Ex. No. 15, Requests No. 2 and 3; Plaintiff's Ex. No. 16, Requests No. 2 and 3; Plaintiff's Ex. No. 17, and Doc 79-Pgs 166-168.

The series of the Petitioner's letters referred to above, to the Respondent and the Respondent's official responses, were relevant to the first (2003) appeal before the Eleventh Circuit. Doc 26-Pgs 3,4,11, and 12. In that the Respondent misled the Petitioner in the discovery process through the violation of its employment handbook rules, the Petitioner was prevented from taking action to bring these documents from the Court Record, 2002-2003 proceedings, forward to the April 18, 2005 proceedings. These letters, their chronology, and their Respondent responses contain information which greatly contradicts the Respondent trial testimony. By the Respondent's motion, the Eleventh Circuit struck these letters from the Record Excerpts, the same letters from the series from which the Eleventh Circuit gathered information in the process of arriving at its 2003 decision regarding this matter. The Respondent moved to strike documents which contained a detailed description of the Petitioner's March 14, 1996 visit to the Northport post

office. The Respondent, in its trial argument for the allowance of the "objection" issue, used information taken from this document in referring to the Petitioner's version of the alleged event, in that no other source of the Petitioner's detailed version existed at that point in time. Doc 78-Pg 18. The Petitioner's testimony as to his detailed version of the alleged event did not occur until the afternoon session of the one-day bench trial. He had not been deposed regarding the alleged event, nor had he given any form of written statement regarding the event other than the document which was struck from the record.

In violation of "Handbook EL-312, Employment and Placement," and in direct conflict with Burdine, the Respondent waited until the midst of the bench trial to bring forth an accusation regarding information which the Petitioner placed on his job application regarding his occupation. Doc 46-Pg 4. The Petitioner, because of the Respondent's actions, was, without prior knowledge, unable to produce, on the spot; certified documents, official cattle registration certificates which he maintained at the time; and continues to maintain; in his possession and which show him as the owner or breeder or both, of purebred cattle, as he stated, at the time of his application for employment with the Respondent. The Eleventh Circuit indicated that the Petitioner did nothing during the bench trial to bring into question the credibility of the Respondent's witnesses. The cattle registration certificates would have shown that a critical witness, a job interviewer who also testified that the Petitioner demonstrated a negative attitude, testified falsely under oath, regarding the application. The Eleventh Circuit stated in its April 26, 2006 Opinion: "Montgomery has not provided a basis for finding clearly erroneous the district court's decision to believe the USPS employees rather than Montgomery," The Respondent's actions in direct conflict with Supreme Court precedent and violations of its employment handbook rules so as to mislead the Petitioner

during discovery, prevented him from doing so.

The Respondent's manual, *Interview - Restricted Guide and Self-Instructional Module - Suitability and Selection Subject Matter Guide,* states that the job interviewer is to rely on data, not just impressions in making his/her selection decision. Doc 45-Pgs 41 and 97, Plaintiff's Ex. No. 4. An individual's personality as perceived by an observer, without the benefit of an objective measurement, such as a personality test; is an impression, dependent upon the observer. In violation of the Respondent's module, the selection official for the Fayette, Alabama post office, Jimmy Barker, according to his trial testimony, made his selections based upon his impression. He did not refer to any interview notes or other data of any kind which would indicate that the younger applicants demonstrated a better personality than the Petitioner. Doc 79-Pgs 35, 37, and 38.

The disregard of Federal agency employment rules published in its employment handbooks, manuals, etc. can adversely affect the Federal employee. Disregard of these rules can also adversely affect the Federal job applicant in his/her treatment and processing during the application and interview procedure, and, ultimately; if a complaint arises, the violation of rule can mislead and hinder the job applicant as he/she seeks redress of mistreatment by the Federal employer. For the stated reasons the Petitioner respectfully requests that the Court grant review of this issue.

III.

Review is Warranted In That Clarification By This Court Is Needed As To Whether the McDonnell Douglas Burden Shifting Framework Applies To ADEA Complaints, and, if So; How it Treats Multiple Incidents Of Non-Selection For Employment Within One ADEA Complaint

This Complaint brought forth by the Petitioner against the Respondent, upon completion of formal discovery, was shown to involve nine separate and distinct Hiring Worksheets in which the Petitioner was passed over for a younger applicant for eleven different jobs over the period from 1995-1998. Doc 46-Pg 6. It appears that the Petitioner, in the event that he had prevailed in the District Court, would have only had the opportunity to recover damages as allowed by law for one incident of age discrimination in employment. This, the Petitioner's attorneys' actions in not amending the original *pro se* complaint to include multiple Counts, and the entire District Court proceedings indicates that a separate Count in the Complaint for each incident of non-selection was not required.

Each incident of non-selection met the conditions and the attending points which were required to carry the Complainant's initial burden if the McDonnell Douglas burden shifting framework applied. However, when the Petitioner presented his prima facie case and moved the District Court for summary judgment, he was denied, even though the Respondent did not meet its burden, with the District Court stating: "...Defendant's production and assertion that others were hired instead of the plaintiff because they were the 'best fit' for the position, without more, is not sufficient to rebut plaintiff's prima facie case." Doc 49- Pg 9.

At trial, in its attempt to carry its burden, the

Respondent offered a sweeping reason: The Petitioner's unsuitable personality, as if only one incident of non-selection had occurred.. The District Court and the Eleventh Circuit echoed this in their Opinions, with the Eleventh Circuit in its April 26, 2006 Opinion; referring to the Petitioner as a "loner" personality, based on no data other than the Respondent's word and the Petitioner's legitimate answer to an interviewer's question. This, in light of the fact that the Respondent's Carrier position performs its job duties alone, not in a group; which transfers well from the Petitioner's work experience in which he was trusted by his employers to carry out technical duties alone, while at the same time functioning as a part of a team effort to affect the output of a process.

The Eleventh Circuit in Walker v. Mortham, 158 F.3d 1177, 11th Cir. (1998), ruled that after-acquired information which was not in the mind of the decision-maker at the time of his/her decision, cannot, at a later date, be used to justify the decision. The official involved in the early incidents of selection of a younger, non-ADEA protected applicant over the Petitioner stated that he made the selections because the younger applicants had a better personality than the Petitioner. This selection official, at trial, did not refer to any documents, Hiring Worksheets, interview notes, or specific answers to his interview questions given by the Petitioner. Another interviewer for a different job, at a later date, testified at trial that the Petitioner stated that he preferred to work alone. The City Carrier position for which the Petitioner applied involves job duties which are performed by the employee, alone, not in a group. This interviewer, during the specific interview, asked the Petitioner how he worked best. The Petitioner, in the context of the question, stated that all of his work experience involved job duties which he performed alone. From this answer the Petitioner was labeled as a "loner" personality.

According to the Respondent's *Interview - Restricted*

Guide and Self Instruction Module Suitability and Selection Subject Matter Guide September 1995, to avoid "canned" and practiced answers by job applicants to interviewer questions, the Respondent does not provide a uniform list of questions for the interviewers to use in the interview process. Doc 45, Plaintiff's Ex. No. 4, Pg 97:

> On the other hand, an entire multimillion dollar industry has developed to prepare applicants for employment testing and interviewing. Sometimes these efforts go beyond helping the applicants to present themselves positively- but accurately- and encourage applicants to "say what will get them hired," regardless of whether it is truthful. (This is one reason we cannot simply develop a list of questions and distribute them for use by the USPS throughout the country; virtually overnight there would be professional coaching services available on those questions.) This is also a reason interviewers must be thoughtful and probe to get past any superficial applicant impressions that might not accurately reflect their qualifications. (Emphasis added)

From this, beyond being highly unlikely, it would have been a violation of the Respondent's module, for each interviewer to use a common list of questions such that, over a span of four years, involving multiple job openings; the Petitioner was questioned each time as to whether he preferred to perform his job duties alone or in a group.

The Eleventh Circuit Court of Appeals, in its April 26, 2006 Opinion regarding this matter wrote in sweeping terms as if the Petitioner's "Loner" personality were a sufficient reason for the Respondent's refusal to hire over multiple job openings spanning several years. The Eleventh Circuit failed to refer to the McDonnell Douglas

framework as it would apply to this circumstance. By this it seems that the Respondent was not required to carry its burden in each instance of refusal to hire. For the stated reasons the Petitioner respectfully requests that the Court grant review of this issue.

CONCLUSION

Based on the foregoing, the Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted on August 22, 2006,

William Lenard Montgomery
Petitioner, Pro Se
16811 Highway 171
Northport, AL 35475-1459
205-339-2292

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

April 26, 2006 Opinion From the United States Court of Appeals For The Eleventh Circuit..... 1-5

June 13, 2006 Order From the United States Court of Appeals For The Eleventh Circuit Denying Petitioner's Petition For Rehearing and Rehearing En Banc..... 6,7

January 12, 2006 Order From the United States Court of Appeals For The Eleventh Circuit Granting Appellee's "Motion to Strike Documents 2 and B-F of Appellant's Record Excerpts."..... 8

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
April 26, 2006
Thomas K. Kahn
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-12961
Non-Argument Calendar

D.C. Docket No. 02-01843-CV-CO-W

WILLIAM LENARD MONTGOMERY,

Plaintiff-Appellant

versus

U.S. POSTAL SERVICE,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Alabama

(April 26, 2006)

Before TJOFLAT, CARNES AND HULL, Circuit Judges.

PER CURIAM:

Plaintiff William Montgomery, pro se, appeals the district court's order granting judgment to the Defendant United States Postal Service (hereinafter "USPS") in this employment discrimination action. After review, we affirm.[1]

Between June 20, 1995 and November 16, 1998, Montgomery, who was over 40, applied for eleven clerk or carrier positions at the USPS but was never hired. Montgomery's complaint alleged that the USPS had refused to hire him because of his age, in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. ("ADEA"). In written discovery responses, the USPS stated that Montgomery was not chosen for the positions because he was not the "best fit" for the positions based on his applications and interviews. Following discovery, both Montgomery and the USPS moved for summary judgment. The district court denied both parties' motions.

During a subsequent bench trial, the district court over Montgomery's objection, admitted testimony from USPS employees who had interviewed Montgomery for each

---

[1]Plainfiff-appellant Montgomery raises additional arguments that we do not address for the following reasons. First, Montgomery argues that the district court erred in denying his motion for summary judgment. That ruling is not reversible on appeal because his age discrimination claim was disposed of after a full trial on the merits. See Lind v.United Parcel Serv., Inc., 254 F.3d 1281, 1284 (11th Cir 2001). Second, Montgomery challenges the district court's ruling on discovery issues related to the mitigation of his damages. Because we affirm the district court's liability finding in favor of the Post Office, any issue related to damages is moot. See Watson v. Drummond Co., Inc. 436 F.3d 1310, 1311 n.1 (11th Cir. 2006).

position. These employees testified that Montgomery was not the "best fit" for the positions because of his negative, anti-social personality, which did not suit him for work with the public. One interviewer also cited Montgomery's behavior during a confrontation with a postal worker at one of the post offices. At the conclusion of the bench trial, the district court entered judgment in favor of the USPS.

On appeal, Montgomery challenges the district court's admission of testimony regarding the specific reasons Montgomery was not hired for the positions. Montgomery contends that the USPS should have been limited to the more general reason of "not the best fit" given in its interrogatory responses because Montgomery was not prepared to respond at trial to the USPS more specific evidence.

A trial judge has broad discretion to determine whether to admit evidence, and this Court will reverse only where there was an abuse of discretion. Wilson v. Bicycle South, Inc., 916 F.2d 1503, 1510 (11th Cir. 1990). We conclude that the district court did not abuse its discretion in admitting the testimony.

During the EEOC mediation prior to his lawsuit, Montgomery learned that his confrontation with the postal worker was the reason for at least one of the hiring decisions. During discovery, the USPS also provided Montgomery with documentation, including interview notes, that evidenced some of the specific reasons for not hiring him. In addition, as the district court noted, the lack of detail in the USPS' interrogatory response "should have been obvious" to Montgomery, yet he did not seek the district court's assistance to elicit a more specific response and did not ask for elaboration from the postal employees he deposed or interviewed. Under these circumstances, we agree with the district court that Montgomery was not unfairly surprised by the USPS' evidence at trial. Accordingly, we find no abuse

of discretion as the district court's ruling.

Montgomery also argues that the district court clearly erred in entering final judgment in favor of the USPS. Montgomery asserts that evidence in the record contradicts the testimony of USPS employees regarding their reasons for not hiring him. He also argues that the district court did not closely examine the evidence and generally disagrees with the district court's interpretation of the evidence.

In reviewing a final judgment by a district court, we must give due regard to the trial court to judge the credibility of witnesses and will not set aside findings of fact in a non-jury trial unless they are clearly erroneous. Fed. R. Civ. P. 52(a); Chandler v. Crosby, 379 F.3d 1278, 1288 (11th Cir. 2004). "Clear error is a highly deferential standard of review." Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325, 1350 (11th Cir. 2005). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Id. at 1351 (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 573-74, 105 S. Ct. 1504 (1985)).

Here, the district court's view of the evidence is entirely plausible in light of the record as a whole. At trial, numerous USPS employees who interviewed Montgomery testified that his "loner" personality and negative attitude made him not the "best fit" for the positions because they believed Montgomery would not interact well with the public, work as part of a team or take direction from supervisors. Montgomery admitted that he told interviewers that he preferred to work alone. He also failed to present any evidence refuting the interviewers' good faith perceptions of

Montgomery's personality and attitude.[2] Instead, Montgomery testified that, during two interviews, USPS employees made comments that Montgomery construed to mean that they suspected his age would make him less competent to perform jobs. USPS employees present during the interviews testified to the contrary. The district court was entitled to judge the credibility of the witnesses at trial. Montgomery has not provided a basis for finding clearly erroneous the district court's decision to believe the USPS employees rather than Montgomery.

For these reasons, we affirm the district court's entry of judgment in favor of the USPS.

AFFIRMED.

---

[2]Two USPS employees, Bonnie Magourik [sic] and Susan Rigby [sic], testified that Montgomery once initiated a verbal altercation with Magourik [sic] in the Post Office in Northport, Alabama. Rigby [sic], a hiring official also testified that this incident led her to request that Montgomery not be considered for future positions with the Post Office and to decline to interview him for future jobs. Montgomery's testimony about the confrontation differs greatly from that of Magourik [sic]. However, the district court was entitled to believe Magourik's [sic] version of events.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
June 13, 2006
THOMAS K. KAHN
CLERK

No. 05-12961-AA

WILLIAM LENARD MONTGOMERY,
Plaintiff-Appellant

versus

U.S. POSTAL SERVICE,
Defendant-Appellee

On Appeal from the United States District Court for the Northern District of Alabama

---

ON PETITION(S) FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before: TJOFLAT, CARNES AND HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/F. Hull
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
January 12, 2006
Thomas K. Kahn
CLERK

No. 05-12961-AA

WILLIAM LENARD MONTGOMERY,
Plaintiff-Appellant

versus

U.S. POSTAL SERVICE,
Defendant-Appellee

On Appeal from the United States District Court for the Northern District of Alabama

---

ORDER:

Appellee's "Motion to Strike Documents 2 and B-F of Appellant's Record Excerpts" is GRANTED.

The Clerk is directed to remove these stricken documents from the record excerpts.

s/ [Signature unintelligible]
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
06-342 AUG 22 2006
OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

William Lenard Montgomery
Petitioner

v.

United States Postal Service
Respondent

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

SUPPLEMENT TO APPENDIX TO PETITION FOR WRIT OF CERTIORARI

William Lenard Montgomery
Petitioner, Pro Se
16811 Highway 171
Northport, AL 35475-1459
(205) 339-2292

SUPPLEMENT TO APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

April 28, 2005 United States District Court ORDER OF FINAL JUDGMENT..... 1

April 28, 2005 United States District Court FINDINGS OF FACT AND CONCLUSIONS OF LAW..... 2-10

Rule 34.3 Compliance Page.....11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

FILED
2005 Apr-28 PM 3:30
U.S. DISTRICT COURT
N.D. OF ALABAMA

WILLIAM L. MONTGOMERY,

Plaintiff,

vs.

UNITED STATES POSTAL SERVICE, JOHN E. POTTER, POSTMASTER GENERAL, in his official capacity,

Defendant.

CV-02-CO-01843-W

ORDER OF FINAL JUDGMENT

In accordance with the findings of fact and conclusions of law entered contemporaneously herewith, it is hereby ORDERED that final judgment be entered in favor of the defendant, U.S. Postmaster General John E. Potter, and against the plaintiff, William L. Montgomery. Costs are taxed to the plaintiff.

Done this 28th day of April 2005.

s/L. Scott Coogler
L. Scott Coogler
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

FILED
2005 Apr-28 PM 3:28
U.S. DISTRICT COURT
N.D. OF ALABAMA

WILLIAM L. MONTGOMERY,

Plaintiff,

vs.

UNITED STATES POSTAL SERVICE, JOHN E. POTTER, POSTMASTER GENERAL, in his official capacity,

Defendant.

CV-02-CO-01843-W

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came before the Court for trial without a jury on the 18th day of April 2005. The Court, having heard the testimony of the witnesses, received and reviewed all of the evidence, including the stipulations, and having heard the arguments of the parties, makes the following findings of fact and conclusions of law:

Findings of Undisputed Facts

The following facts were undisputed:

1. Plaintiff William L. Montgomery was born on July 29, 1952. He graduated from Northside High School in Samantha, Alabama in 1970, and holds separate Bachelor of

Science degrees in Chemistry and Chemical Engineering from the University of Alabama in Tuscaloosa, Alabama.

2. In October of 1994, Mr. Montgomery took the U.S. Postal Service's entrance examination for distribution and delivery positions. He scored an 88.5 and received a rating of "eligible." Mr. Montgomery was added to the U.S. Postal Service's "hiring registers" for the positions of clerk and carrier at the Fayette, Northport, and Tuscaloosa, Alabama post office locations. These were entrance level positions for which no experience was required and Mr. Montgomery met the physical requirements for the positions.

3. According to Postal Service Handbook EL-312, a "register" is a system of records that contains applicant examination ratings, the result of an evaluation process, or both. The Postal Service uses registers as a source of qualified candidates from which to select and appoint new employees.

4. Appointing (or selecting) officials are responsible for determining job vacancies at particular post offices and are responsible for selecting applicants for appointment to those vacant positions. The registers are used by the Postal Service's Human Resource Department to compile a list of eligible applicants to be certified on what is called a "hiring worksheet." The list of certified eligible applicants [the hiring worksheet] is then sent to the selecting official for the postal facility at issue and interview notices are sent to each eligible applicant on the hiring worksheet.

5. It is the Postal Service policy to screen applicants for employment "eligibility" and "suitability" prior to "considering" that applicant for appointment to a postal position. Applicants who are found to be ineligible or unsuitable for employment are made inactive on the hiring register.

6. An applicant who is not suitable is disqualified from

consideration for employment. An applicant that is determined to be ineligible or unsuitable for a position, and thus disqualified, is not to be included among those available for consideration on the hiring worksheet.

7. The selecting official is required to make a selection for a position from among the three highest rated applicants available for the type of appointment being offered from the appropriate register. Selecting officials are required to select the applicant whose qualifications make them the best fit for the positions for which they are being considered. In order to do this, they must use the rule of three when making selections.

8. The "rule of three" is described in the selection manual as follows: "For the first vacancy, the appointing official selects from among the three highest on the hiring worksheet who are available for the position to be filled. If more than one vacancy is available, eligibles not selected in filling the first vacancy and the next available eligible on the hiring worksheet are then considered. An eligible who has been considered three times for the same job category, and not selected, is not considered again for the job category and installation. However, the eligible's name remains on the active hiring register until considered three times for other job categories and installations for which the register is used."

9. Handbook EL-312 discusses the "eligibility" requirements of an applicant, which include: (1) age requirements (generally, a minimum age of 18), (2) restrictions on the employment of relatives, and (3) selective service registration (for male applicants). "Suitability" criteria for candidates include: (1) conscientiousness, (2) adaptability, (3) cooperation, and (4) communication.

10. Favorable eligibility and suitability decisions make it possible for the applicant to advance in the hiring process.

This means the applicant can be considered, and if selected, given a bona fide job offer followed by a medical assessment.

11. Between the dates of June 20, 1995 and November 16, 1998, the plaintiff was called in approximately eleven (11) times to interview for vacant clerk and/or carrier positions with the Postal Service.

12. During this time period, Mr. Montgomery was certified and appeared on approximately nine "hiring worksheets" where he was in the group of top three candidates ("group of three") for eleven (11) different positions. Mr. Montgomery was "considered" for these eleven positions but was "non-selected," or passed over for someone else, for each position.

13. On or about June 20, 1995, Mr. Montgomery was within the group of three that was considered for the position of carrier. Michael Sullivan was selected over Plaintiff. The selecting official was Jimmy E. Barker. At the time of selection, Mr. Sullivan was 30 years of age, whereas Plaintiff was about to turn 43 on July 29, 1995. The starting hourly rate for this position was $12.59 per hour. The number of hours worked weekly in this position would average to 40.

14. On or about August 3, 1995, Mr. Montgomery was within the group of three that was considered for the position of carrier. Janice Oden was selected over Plaintiff. The selecting official was Jimmy E. Barker. At the time of this selection, Ms. Oden was 32 years of age, and Plaintiff was age 43. The starting hourly rate for this position was $12.77 per hour. The number of hours worked weekly in this position would average to 40.

15. On or about January 17, 1996, Mr. Montgomery was within three separate groups of three that were considered for the position of carrier. Freddy Long, Terri Horner, and Nikki Warren were each selected over Plaintiff. The selecting official was Robert Hoffman. Mr. Long's age has not been

stated by Defendant. At the time of the selection, Ms. Horner was 28 years of age, Ms. Warren was 21 years of age, and Plaintiff was age 43. The starting hourly rate for this position was $12.77 per hour. The number or hours worked weekly in this position would average to 40.

16. On or about February 2, 1996, Mr. Montgomery was within the group of three that was considered for the position of clerk. Charles Fuller was selected over Plaintiff. The selecting official was Robert Hoffman. At the time of his selection, Mr. Fuller was 23 years of age, and Plaintiff was age 43. The starting hourly rate for this position was $12.77 per hour. The number of hours worked weekly in this position would average to 40.

17. On or about February 15, 1996, Mr. Montgomery was within the group of three that was considered for the position of clerk. Tommie Smith was selected over Plaintiff. The selecting official was Robert Hoffman. At the time of her selection, Ms. Smith was 27 years of age, and Plaintiff was age 43. The starting hourly rate for this position was $12.77 per hour. The number of hours worked weekly for this position would average to 40.

18. On or about January 2, 1997, Mr. Montgomery was within the group of three that was considered for the position of carrier. Jennifer Killingsworth was selected over Plaintiff. The selecting official was Jimmy E. Barker. At the time of her selection, Ms. Killingsworth was 26, years of age, and Plaintiff was age 44. The starting hourly rate for this position was $13.03 per hour. The number of hours worked weekly in this position would average to 40.

19. On or about April 1, 1997, Mr. Montgomery was within the group of three that was considered for the position of clerk. Brandy Swinney was selected over Plaintiff. Robert Hoffman was the selecting official. At the time of this selection, Ms. Swinney was 22 years of age, and Plaintiff was

age 44. The starting hourly rate for this position was $13.51 per hour. The number of hours worked weekly in this position would average to 40.

20. On or about December 22, 1997, Mr. Montgomery was within the group of three that was considered for the position of carrier. April McMillan was selected over Plaintiff. The selecting official was Susan Rigsby. At the time of her selection, Ms. McMillan was 22 years of age, and Plaintiff was age 45. The starting hourly rate for this position was $13.42 per hour. The number of hours worked weekly in this position would average to 40.

21. On or about November 16, 1998, Mr. Montgomery was within the group of three that was considered for the position of clerk. Chad Trull was selected over Plaintiff. The selecting official was Susan Rigsby. At the time of this selection, Mr. Trull was 25 years of age, and Plaintiff was over the age of 46. Mr. Trull and the Plaintiff had the same score on the hiring worksheet. The starting hourly rate for this position was $13.61 per hour. The number of hours worked weekly in this position would average to 40.

Discussion of Disputed Issues

Plaintiff William L. Montgomery filed suit against the defendant for discrimination[1] under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq.* Under the ADEA, it is "unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise

[1]On January 23, 2004, Plaintiff amended his complaint to add a cause of action for retaliation under the ADEA. (Doc. 36) Plaintiff's claim of retaliation was subsequently dismissed voluntarily, and only Plaintiff's allegations of discrimination under the ADEA remain before this Court.

discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Chapman v. Al Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000) (quoting 29 U.S.C. § 623 (a)(1)). "When a plaintiff alleges disparate treatment, 'liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000) (quoting *Hazen Paper Co. v. Biggens*, 507 U.S. 604 (1993)). "That is, the plaintiff's age must have 'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome,'" *Id.*

At trial, the defendant asserted that Mr. Montgomery was not hired because of legitimate, nondiscriminatory reasons. Specifically, the defendant presented evidence, through witnesses and exhibits, that Plaintiff was not hired because interviewers concluded that he was arrogant, did not work well with others, was not a "team player," and otherwise did not have the personality to work well with the public.

The plaintiff, who was apparently relying upon the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248 (1981), to prove intentional discrimination based upon circumstantial evidence, thus became obligated to demonstrate "that the proffered reason[s] [were] not the true reason[s] for the employment decision[s]." *Burdine*, 450 U.S. at 256. "[He] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id* at 256. Plaintiff testified in an effort to meet his burden of demonstrating

pretext, but was unsuccessful.[2]

"The ultimate burden of persuading [this Court] that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253. The defendant's intent in this case is the "ultimate question." *Id.* After full consideration of the evidence in this case, it is this Court's conclusion that the defendant did not intentionally discriminate against the plaintiff for any reason prohibited by law. Plaintiff's age did not play any role in the defendant's decisions to not hire him.

Conclusion

---

[2]Plaintiff complained that the defendant, in its responses to discovery, failed to specify the reasons it subsequently presented at trial for its hiring decisions. The defendant had previously argued that Plaintiff was simply not the best fit for the job.

The Court notes, however, that the plaintiff did receive as part of discovery many, if not all, of the exhibits admitted at the time of trial, which evidenced some of the interviewer's rationales for their decisions. In addition, at least one of the interviewers was questioned by an attorney representing the plaintiff long before the trial.

If the plaintiff felt Defendant's responses to discovery were incomplete or otherwise inadequate, he should have brought that to the attention of the Court through a properly filed discovery motion. However, in an abundance of caution, the Court nonetheless allowed the plaintiff to present his evidence of intent (including any evidence of pretext) after the defendant concluded its evidentiary presentation. This allowed the plaintiff to know exactly what the defendant proved (or attempted to prove) before he was required to provide his evidence of intent. Despite this strategic advantage, the plaintiff was unable to carry his burden of proving that age played a role in the defendant's decision not to hire him.

For the reasons stated above, judgment is due to be entered in favor of the defendant and against the plaintiff. A separate order consistent with this opinion will be entered.

Done this 28th day of April 2005.

s/L. Scott Coogler
L. Scott Coogler
UNITED STATES DISTRICT JUDGE

Respectfully submitted on September 5, 2006.

William Lenard Montgomery
Petitioner, Pro Se
16811 Highway 171
Northport, AL 35475-1459
205-339-2292